LAW IN WAR TIME — 1917

WE have recently been reminded, and by a statesman-lawyer,[1] that because we cannot have, at the same moment, successful war and free democracy, we are obliged to surrender for the time being a great measure of that liberty which generations of lawyers have insisted on before a lengthening line of judges. We must remain true to our faith, but are told that in the presence of a sufficiently powerful autocracy, democracy cannot be maintained; it can live only by killing the autocracy. This is a hard saying, for it assumes the necessity of borrowing that weapon of a really strong tyranny most hateful to any democracy, — an imposed discipline; self-discipline is not enough.

The difference between self-denial and some discipline is not great, nor easy of statement, and probably most men now feel some instinct of abnegation. This REVIEW lately said editorially, "Every one is of course willing to give government a latitude in time of war different both quantitatively and in kind from its powers in time of peace." As to *quantum* of power, yes; the process is easy and historical, but a difference in kind is not only hard to swallow, but even to understand; for to a large minority, at the very least, the resulting status seems to suggest the question, not how much latitude we have given or should give government, but how much latitude government has left to us.

This last is the condition of mind, sure of production if not already observed, and resulting from war legislation; a style of law making already considerable in volume, and certain of increase. Such legislation, however, shows as yet small sign of any attempt to take from bench and bar their accustomed function of exposition, interpretation or condemnation, wherefore some review of our preparation for that task, and of what 1917 brought forth by way of performance, is the subject of this essay.

Historically considered, no body of men could be better fitted for hostile and destructive criticism of laws in aid of war than our bar and a bench recruited from it. By definition, a breach of peace

[1] Mr. Elihu Root, in his address to the Conference of Bar Associations.

is a breach of law, yet war exists by act of Congress. Every system of law we have known presupposes and rests on the will of a huge peaceful community, reluctantly and tenderly dealing with its naughty children. All lawyers instinctively regard a state of war as the negation of law in its broader sense; yet such a profession must deal with these statutes born of necessity. Our ability to do this rightly and broadly, can only grow out of a profound belief in the necessity of union in discipline, and a keen preception of the real wickedness of the great Frederick's maxim, that the average citizen of a well-conducted state should not know that a war was in progress. If freemen do not acutely feel and righteously hate war conditions, the political disease of which they are the symptoms cannot be eradicated. But a righteous hate is a very different thing from whining complaint.

The people generally have shown in 1917, and in a most striking way, the educational result of about a generation of nation-wide statutes, from the Sherman Act, through interstate commerce legislation, the Food and Drug Statute, and the like, to the Child Labor Bill. In time of peace, increasing impatience with parochial state action, or the lack of it, has produced increasing regulation as wide as the extent of interests affected; for that reason, in part, it has appeared to the majority natural to demand national assistance and regulation regarding matters even dimly, perhaps, seen as sure to be affected by the dislocations of war. Whether without the spectacle afforded by nearly three years of conflict in Europe, such majority inclination would have existed, may be doubted; but that without the stimulation of national activities increasing by leaps and bounds for the past quarter century, the process would have been slower and more difficult, is not doubtful at all. Especially is it true, that without that preparation, the people would not and indeed could not have accepted national interference with individual (*i. e.*, non-corporate) production, distribution, and sales for private profit.

But there is always a minority of which our tradition is very considerate in each individual case. We can and do pass severe laws, but he is indeed an unfortunate offender, who cannot remain enlarged on bail, until the highest court discusses his offence as an academic puzzle, after time has dulled the edge of memory. The right of suit is very precious to many; every plaintiff can feel as his own the motto: "Serve God and take your own part," — and he

usually regards the two halves of the maxim as synonymous; but even the most selfish litigant over a matter of public interest meets with a certain toleration, for the American people entirely comprehend that the rights of the public have usually been threshed out at private expense in litigation instituted or invited by private citizens for their personal advantage, and most of us regard that method as both economical and expedient.

Then, too, minorities increase when the statutes begin to hurt; and they hurt both citizens and aliens, the latter a class which has existed longer and in greater numbers in the United States than anywhere else, — and as such wholly untouched by governmental activities; passports and strangers' taxes have been unknown, — anything like them is resented. In short, the inherited American attitude to government is that some must pay taxes (normally a very small part of the electorate), but so far as one's person is concerned, a man can have to do with government as much or as little as he pleases. Direct official interference with private life has been growing, but is still rare; we have been afraid to meddle with the ultimate individual citizen, even in such matters as sanitary regulations. Landlords who fail to provide water closets, and carriers omitting individual drinking cups, are proscribed by statute, but filthy tenants or careless passengers are untouched by law. Upon the whole it is a well-intentioned, but undisciplined public on which descend war laws hitherto unknown, — litigation over whose administrative enforcement would seem absolutely certain.

Quantitatively it would be quite useless to dwell on recent legislation, but the qualitative difference between the legislative output of the German war and all previous experiences is a study both legal and social.

The Conscription Act,[2] and the Questionnaire[3] devised thereunder after one experience with local boards choosing men for "Selective Service" under their own several interpretations of the statute, its object and meaning, show radical novelty. The act itself is the first effort in this country to do away with bounties, and the purchase of exemption by furnishing substitutes; while the questionnaire system (with almost no public notice of the point) marks a more complete departure from local home rule than any military effort in our history. The "local boards" were loyally

[2] May 18, 1917.

[3] P. M. G. O., Form 1001.

chosen from residents of each district, they did wonderfully well, yet produced results so persuasively divergent, that government dared, as it did not six months earlier, to compel uniformity of action by turning them into mouthpieces for the central authority.

These new departures have not directly produced litigation as yet; but regardless of history the constitutional power to pass any such statute has been challenged, and its administration assailed by both *habeas corpus* and bill in equity.

The theorizing of Dr. Hannis Taylor [4] to the effect that no American soldier can be sent overseas except by his own will, may be regarded as a negligible curiosity, but the act has been held constitutional in widely separated jurisdictions.[5] Some variants of the general question are novel; a local board is not an unlawful species of court; [6] one keeping a bawdy house within five miles of a camp cannot escape prosecution under section 13 as a person not subject to military authority; [7] requiring a man to show his registration card does not compel him to give evidence against himself in violation of the Fifth Amendment; [8] every man of statutory age is *ipso facto* within the purview of the act, which therefore affects him before registration;[9] and those whose words or writings tend to prevent registration or induce refusal to register, may be indicted for conspiracy;[10] while conscientious objectors whose language has similar purport must take their chances with a *petit* jury.[11] The alien non-declarant, though specifically exempt under the act, has furnished

[4] Dr. Taylor's Memorial is in CONG. RECORD, October 4, 1917. An excellent reply by former Attorney General George W. Wickersham, has been reprinted as a pamphlet from the Philadelphia Press of August 19, 1917.

[5] Most of the decisions as yet made are not in the reports; many of them, being charges to juries, will not appear. They are being published through the Department of Justice as "Bulletins of Interpretation of War Statutes," and will be referred to by number. The whole number before January 7, 1918, is thirty-two, all in District Courts, unless otherwise stated. The constitutionality of the statute has been upheld in Angelus *v.* Sullivan (C. C. A. 2d Bulletin 2); *Re* Stephens (Delaware, Bulletin 13); The Jeffersonian (S. D. Georgia, Bulletin 24); United States *v.* Olson (Washington, Bulletin 20). And since writing the text the Supreme Court has so held; the Chief Justice finding (as so often before) that the contention of unconstitutionality did not survive statement, *Re* Granbard *et al.*

[6] *Re* Stephens, *supra.*

[7] *Re* Smith, N. D. Georgia, Bulletin 17.

[8] *Re* Olson, *supra.*

[9] *Re* Stone, E. D. Pennsylvania, Bulletin 25.

[10] *Re* Phillips, S. D. New York, Bulletin 14.

[11] *Re* Traina, S. D. New York, Bulletin 18.

more litigation than any other single class. Owing to treaty obligations, such men have never been regarded as properly subject to compulsory military service;[12] under the present statute they must, like all other of the excepted classes claim exemption. Many have not done so, or failed so to do by the records of the local board before which they appeared; and after being held for service have either procured a *habeas* or filed a bill to enjoin the board members from certifying them.

The first procedure has resulted in a very doubtful ruling that the writ did not issue as of right during war, and that the matter was within the "domain of military authority";[13] and several decisions, thought to be correct, that such alien having had an opportunity for hearing, and having made no timely claim of exemption before the local board lost jurisdiction, must be remitted to executive action, — the law had been satisfied.[14]

Efforts to use equity, to enjoin local boards from acting in respect of plaintiffs calling themselves alien non-declarants, have been unsuccessful on the ground that injunctive relief could not be granted as against such governmental agencies.[15]

The Espionage Act [16] is regarded as a radical novelty in America, and the popular view is in the main correct, for it has given our law a new word, which as defined in section 1 of the statute covers acts long known as most injurious to national security, and never before visited in this country with statutory condemnation. Yet those sections which have as yet given rise to any litigation, when taken in conjunction with that part of the Conscription Act relating to obstructing recruiting or enlistment,[17] suggest the Sedition Act of 1798 [18] in a manner possibly still alarming to lawyers of political proclivities, if they know any history.

Indictments for spoken words calculated to obstruct enlistment, or to cause or incite insubordination, mutiny, or disloyalty in the military or naval forces of the United States, will cover a multitude

[12] MOORE, INTERNATIONAL LAW DIGEST, vol. 4, 50 *et seq.*

[13] *Re* Troiani, E. D. Pennsylvania, Bulletin 8.

[14] *Re* Hutflis, W. D. New York, Bulletin 11; *Re* Summertime, E. D. Michigan, Bulletin 16; *Re* Koopowitz, S. D. New York, Bulletin 10; *Re* Cubyluck, E. D. New York, Bulletin 28.

[15] Angelus *v.* Sullivan, *supra; Re* Bonifaci, W. D. Washington, Bulletin 9.

[16] June 15, 1917.

[17] Section 3. *Cf.* Title I, § 3, and Title XII of Espionage Act.

[18] 1 STAT. 596.

of sins, when so large a proportion of our youth are in uniform, or nearly so. It has been thought that the criminality of such language rests solely on the statute,[19] a view open to doubt, to say the least; also that section 21 of the Federal Penal Code punishing the offense of preventing by intimidation another from taking office under the United States, covers the case of joint signers of a letter to county officials denouncing conscription and the local quota thereunder,[20] apparently because the recipients of the letter were or might be members of local boards; juries have been told that cursing the President or other officials is not *per se* criminal, but may be considered in ascertaining whether the "natural and legitimate" result of defendant's language was to wilfully obstruct recruiting,[21] and substantially similar instructions were given in the case of one (apparently a follower of Dr. Hannis Taylor) who *inter alia* had said: "I cannot see how the government can compel troops to go to France; if it was up to me I'd tell them to go to hell." [22] Advising men not to report for military service is clearly within the Espionage Act.[23]

Writing or print must usually go through the mails to obtain any considerable audience, and several publications have been debarred from postal privileges by the Postmaster General, and failed to obtain injunctive relief from the courts.[24] The ground of decision has not been solely that in the opinion of the court the newspaper or periodical violated the statute, but also that the Postmaster General had so found; and the courts interfere with such findings only when the case is very clear.

This statute has greatly enlarged our protective legislation in some matters having no very obvious relation to spying or any allied word. Title V gives powers long needed in respect of clearances of ships, which have usually been regarded as something collectors could not refuse;[25] Title VII gives embargo powers to the President, which should lay some constitutional ghosts that have

[19] *Re* Wallace, Iowa, Bulletin 4.

[20] *Re* Baltzer, South Dakota, Bulletin 3.

[21] *Re* Doll, South Dakota, Bulletin 5.

[22] *Re* Krafft, New Jersey, Bulletin 6.

[23] *Re* Sugarman, Minnesota, Bulletin 12.

[24] The Jeffersonian, *supra;* Patten *v.* The Masses, C. C. A. 2d Bulletin 7; see also Bulletin 26. *Re* Pierce, N. D. New York, Bulletin 15.

[25] Hendricks *v.* Gonzalez, 67 Fed. 351.

walked since the days of Jefferson, and by Title XI search warrants are authorized under many circumstances, — a right long withheld by congress to the detriment of the public in many ways. It is not unimportant to note, in respect of these general provisions, that the Espionage Act is not in terms temporary, and repeals the ineffective statute of somewhat similar purport passed in 1911.[26]

National legislation directly and along familiar lines strengthening the military arm is by no means exhausted,[27] but there has as yet been no judicial comment, so far as ascertainable, on the other new statutes. Congressional action has been supplemented by many state acts, of which the New York statute authorizing the suspension of liquor licenses in places near camps, munition factories, etc., has been tested, and upheld as not violating the constitution of the State.[28]

By some fortunate chance, what is the most important single disciplinary regulation concerning any army was recast in modern shape in 1916, after persistent neglect for over a century, *viz.*, the Articles of War.[29] The second section thereof, subjecting retainers and persons accompanying an army to the jurisdiction of court martial, has been upheld as applied to a seaman voluntarily serving on an army transport.[30]

There is nothing both novel and important in any litigation as yet yielding judicial rulings, and arising under the acts above noted which directly affect the uniformed forces; but the spirit in which the matters have been treated is refreshing. Our heritage is very legalistic; *Ex parte Merryman*,[31] with its picture of a United States soldier refusing the United States marshal entrance to a fort, lest he should serve a *habeas*, is not pleasant reading.[32] Nor is *Ex parte*

[26] Title I, § 9.

[27] The Repatriation Act (in respect of foreign enlistments) of October 5, 1917; the Explosives Act (providing for control of manufacture and sale thereof) of October 6, 1917; the act authorizing seizure of even partially enemy-owned ships, of May 12, 1917, and the Air-Craft Act of October 1, 1917.

[28] People, *ex rel.* Doscher *v.* Sisson; the opinion by Putnam, J., puts decision squarely on the duty and right of the states to "render loyal aid in the prosecution of war" to the national government. App. Div. 2d Dept. Bulletin 32.

[29] 39 STAT. 650.

[30] *Re* Gerlach, S. D. New York, Bulletin 31.

[31] TANEY, U. S. Cir. Ct. 246.

[32] I have personally known an officer who for the same reason, *i. e.*, to avoid service of *habeas*, never left Fort Lafayette, New York Harbor, for over a year and a half, when that enclosure was used for internment purposes during the Civil War.

Milligan,[33] with its aftermath of *Milligan* v. *Hovey*[34] and *McCall* v. *McDowell*,[35] very encouraging to any man charged with the suppression of ununiformed hostility. The doctrine of the Milligan case that "Martial law can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," received something of a shock in *Re D. F. Marais*,[36] but our decision is still law for us. Yet as far as we have gone, the courts in 1917 have read the acts with a real sympathy for their purpose, without that verbal criticism which their hasty construction too often renders easy, — and without any discernible jealousy of military or executive power.[37]

When one turns from laws for or directly affecting the military to such statutes as the Transportation Priority Act,[38] the Coastwise Trade Act,[39] the Trading with the Enemy Act,[40] the Food and Fuel Conservation Act,[41] and the Agricultural Seed Act,[42] there appears a kind of governmental effort absolutely new in American history, and concerning which no court has yet been called on to speak. On the subjects treated we have no social or political traditions that have not been violated, and few inherited legal suggestions.

That trading with the enemy was unlawful needed no declaratory statute,[43] but the effect of hostilities on enemy property within the country, especially when one had to deal with modern investment securities, was something greatly requiring regulation. Here we have traditions of gentleness, if not helplessness, that without statutory guidance would certainly not have answered modern requirements. Mere declaration of war did not justify confiscation in 1812,[44] and the statutes for seizure of hostile property passed

[33] 4 Wall. (U. S.) 2

[34] 3 Biss. U. S. Cir. Ct. 13.

[35] DEADY, U. S. Cir. Ct. 233.

[36] [1902] A. C. 109.

[37] One of the best written and most rancorous of recent exhibitions of this always existing feeling is by Prof. H. W. Ballentine of the University of Wisconsin: "Unconstitutional Claims of Military Authority," JOURN. OF. AM. INST. OF CRIMINAL LAW, vol. 5, 718, January, 1915.

[38] August 10, 1917.

[39] October 6, 1917.

[40] October 6, 1917.

[41] August 10, 1917.

[42] August 10, 1917.

[43] THE PRIZE CASES, 2 BLACK, (U. S.) 635.

[44] Brown *v.* United States, 8 Cranch, (U. S.) 110.

during the Civil War were construed for obvious reasons *in mitiori sensu*.[45]

The present being in the quaint language of *The Eliza*[46] a "solemn" or "perfect" war, all the people of one nation being arrayed against all those of another; congress has created a body of legislation to be justified and upheld only by the simple and fundamental doctrine that the power to perform an act includes by necessary inference the power to do it in any way or by any means not specifically prohibited, which classic *dictum* in its modern application assumes that waging a twentieth-century war means waging it with a people disciplined, that is guided and assisted in production, distribution, sale and consumption, as well as with an army and navy subsisting on the fruits of such discipline behind the lines.

Thus the instant driving force behind Marshall's familiar doctrine, which as usual is appealed to as the legal bulwark of our nationality,[47] is and must be a perception on the part of bench and bar that means change: tools are new, requirements enlarge, — but the really legal yardstick does not; because the law justifies a result, it concerns itself with means only incidentally.

We have not gone very far, the courts have been but little appealed to, the period of reaction has scarcely arrived. The facts, however, are to be faced; that as war measures, our jealously guarded coastwise trade has been opened to foreigners, the executive has been placed in charge of the necessaries of life, with powers of requisition putting all previous extension of eminent domain in a far background, the transportation systems of the country are no longer *common* carriers, and instead of being affected by a public use, or being called public utilities, have become an instrument of government, while the Secretary of Agriculture has become a national seedsman.

As lawyers, we have no precedents in the narrow sense, but we have principles enunciated in days when national feeling and sentiment were in the making. The philosophical grasp, as well as the loyalty of bench and bar, will be tested as never before, especially by these efforts to discipline the nation behind the guns.

A good beginning seems to have been made, but the end is not

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[45] *E. g.*, United States *v.* Dunnington, 146 U. S. 338.

[46] 4 Dall. (U. S.) 40.

[47] Neterer, J., has already done so in United States *v.* Olson, *supra*.

yet, and thought on these war-time laws is the more necessary, because no one can doubt that even if the executive departments are not popularly deemed very successful managers of national housekeeping, their efforts under these statutes will suggest business, and therefore legal queries and possibilities that will bear much fruit hereafter.

Whether that fruit be good or bad, will to a considerable extent depend on how much thinking the bar does now.

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